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STATE OF HAWAII
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HRD09/4343

May 21, 2009

Honorable Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

**RE: Request for comments on Nadao Makimoto's Surface Water Use Permit
Application – Existing Uses, Nā Wai `Ehā Surface Water Management Areas, Maui.**

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated April 29, 2009 and appreciates the opportunity to comment on Nadao Makimoto's Surface Water Use Permit Application (SWUPA) for an existing use in the Nā Wai `Ehā Surface Water Management Area.

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes," and that, in setting the IIFS, "the Commission may reclaim instream values to the inevitable displacement of existing offstream uses" (emphasis added)). Nor can it be determined whether there are "competing applications" within the meaning of HRS §§ 174C-50(h) and -54. Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered until the IIFS are established. Once that occurs, the SWUPAs should be considered

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concurrently; in other words, Mr. Makimoto should not have any priority simply by virtue of the fact that he filed his SWUPA earlier than other existing users.

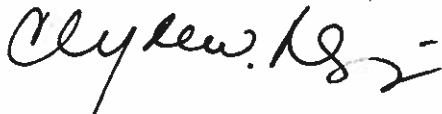
Mr. Makimoto would, however, have priority over other existing users by virtue of the appurtenant right he claims. However, there is no evidence included in Mr. Makimoto's SWUPA from which his claim to an appurtenant right can be evaluated. His SWUPA should be supplemented to include prima facie evidence of the existence of an appurtenant right, so that the Commission can determine the applicability of HRS § 174C-63.

Even assuming Mr. Makimoto has an appurtenant right to water, however, his use must be reasonable-beneficial. OHA notes that the 10,400 gallons per day (gpd) that Mr. Makimoto estimates as his existing use, over 0.585 acres, amounts to approximately 17,800 gallons per acre per day (gad), which appears excessive for domestic use. OHA notes that the Maui County Department of Water Supply planning guideline for domestic use for single family and duplex residences is 3,000 gad or 600 gpd per unit.

OHA also observes that the "Alternatives Analysis" (Table 4) in Mr. Makimoto's SWUPA is neither accurate nor helpful, and is thus inadequate. However, if Mr. Makimoto's land has an appurtenant right, that right would entitle him to water from Waikapū Stream and he should not be required to demonstrate the lack of practicable alternative sources. OHA therefore reiterates that Mr. Makimoto's SWUPA should be supplemented to include prima facie evidence of his appurtenant right.

OHA is the "principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." (Hawaii Revised Statutes (HRS) § 10-3(3)). It is our duty to "[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians." (HRS § 10-3(4)). As such, we thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources. If you have further questions, please contact Grant Arnold by phone at (808) 594-0263 or e-mail him at granta@oha.org.

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o
Administrator

C: OHA CRC Maui